

COMMONWEALTH OF MASSACHUSETTS

At the Supreme Judicial Court holden at Boston within and for said Commonwealth  
on the eighth day of March, in the year two thousand and four:  
present,

<u>HON. MARGARET H. MARSHALL</u>	)	
	)	
<u>HON. JOHN M. GREANEY</u>	)	
	)	
<u>HON. RODERICK L. IRELAND</u>	)	
	)	
<u>HON. FRANCIS X. SPINA</u>	)	Justices
	)	
<u>HON. JUDITH A. COWIN</u>	)	
	)	
<u>HON. MARTHA B. SOSMAN</u>	)	
	)	
<u>HON. ROBERT J. CORDY</u>	)	

ORDERED: That the Massachusetts Rules of Criminal Procedure adopted by order  
dated October 19, 1978, as amended, to take effect on July 1, 1979, are hereby amended as  
follows:

Rules 1, 3, 5, 7, 11, 12, 13, and 14:

By striking out said rules and  
inserting in lieu thereof the new Rules  
1, 3, 5, 7, 11, 12, 13, and 14 attached  
hereto;

Rule 3.1:

By inserting the new Rule 3.1  
attached hereto;

Rule 34:

By striking out the following caption:

- (Applicable to the Superior Court  
and jury sessions in District Court).

The amendments accomplished by this order shall take effect on September 7, 2004  
and shall apply only to those cases initiated (by indictment or complaint) on or after the  
effective date.

<u>MARGARET H. MARSHALL</u>	)
	)
	)
<u>JOHN M. GREANEY</u>	)
	)
	)
<u>RODERICK L. IRELAND</u>	)
	)
	)
<u>FRANCIS X. SPINA</u>	)
	)
	)
<u>JUDITH A. COWIN</u>	)
	)
	)
<u>MARTHA B. SOSMAN</u>	)
	)
	)
<u>ROBERT J. CORDY</u>	)

Justices

## RULE 1. TITLE; SCOPE

(a) Title. These rules may be known and cited as the Massachusetts Rules of Criminal Procedure. (Mass.R.Crim.P.)

(b) Scope. These rules govern the procedure in all criminal proceedings in the District Court, in all criminal proceedings in the Superior Court, in all delinquency and youthful offender proceedings in the Juvenile Court, District Court and Superior Court consistent with the General Laws, and in proceedings for post-conviction relief.

Rule 3. COMPLAINT AND INDICTMENT; WAIVER OF INDICTMENT; PROBABLE

CAUSE HEARING

(a) Commencement of Criminal Proceeding. A criminal proceeding shall be commenced in the District Court by a complaint and in the Superior Court by an indictment, except that if a defendant is charged in the District Court with a crime as to which the defendant has the right to be proceeded against by indictment and the defendant has waived the right to an indictment pursuant to subdivision (c), the Commonwealth may proceed in the Superior Court upon the complaint.

(b) Right to Indictment. A defendant charged with an offense punishable by imprisonment in state prison shall have the right to be proceeded against by indictment except when the offense charged is within the concurrent jurisdiction of the District and Superior Courts and the District Court retains jurisdiction.

(c) Waiver of Indictment.

(1) Right to Waive Indictment. A defendant charged in a District Court with an offense as to which the defendant has the right to be proceeded against by indictment shall have the right, except when the offense charged is a capital crime, to waive indictment, unless the Commonwealth proceeds by indictment pursuant to subdivision (e) of this rule.

(2) Procedure for Waiving Indictment. The defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right in the District Court prior to the determination to bind the case over to the Superior Court

for trial. The District Court may for cause shown grant relief from that waiver.

After the determination by the District Court to bind the case over to the Superior Court for trial, the defendant may waive the right to be proceeded against by indictment by filing a written waiver of that right, with the consent of the prosecutor, in the Superior Court.

(d) Transmission of Papers. If the defendant is bound over to the Superior Court for trial after a finding of probable cause or after the defendant waives a probable cause hearing, the clerk of the District Court shall transmit to the clerk of the Superior Court a copy of the complaint and of the record; the original recognizances; a list of the witnesses; a statement of the expenses and the appearance of the attorney for the defendant, if any is entered; the waiver of the right to be proceeded against by indictment, if any is executed; the pretrial conference report, if any has been filed; and the report of the department of mental health as to the mental condition of the defendant, if such report has been filed under the provisions of the General Laws.

(e) Indictment after Waiver. Notwithstanding the defendant's waiver of the right to be proceeded against by indictment, the prosecuting attorney may proceed by indictment.

(f) Probable Cause Hearing. Defendants charged in a District Court with an offense as to which they have the right to be proceeded against by indictment and defendants charged in a District Court with an offense within the concurrent jurisdiction of the District and Superior Courts for which the District Court will not retain jurisdiction, have the right to a probable cause hearing, unless an indictment has been returned for the same offense. If the District Court finds that there is probable cause to believe that the defendant committed the

crime or crimes alleged in the complaint, the court shall bind the defendant over to the Superior Court. If the District Court finds that there is no probable cause to believe that the defendant committed the crime or crimes alleged in the complaint, the court shall dismiss the complaint.

(g) The Complaint Process

(1) Procedure for Obtaining a Complaint. Any person having knowledge, whether first hand or not, of the facts constituting the offense for which the complaint is sought may be a complainant. The complainant shall convey to the court the facts constituting the basis for the complaint. The complainant's account shall be either reduced to writing or recorded. The complainant shall sign the complaint under oath, before an appropriate judicial officer.

(2) Probable Cause Requirement. The appropriate judicial officer shall not authorize a complaint unless the information presented by the complainant establishes probable cause to believe that the person against whom the complaint is sought committed an offense.

### Rule 3.1. DETERMINATION OF PROBABLE CAUSE FOR DETENTION

(a) No person shall be held in custody more than twenty-four hours following an arrest, absent exigent circumstances, unless:

(i) a warrant or other judicial process authorizes the person's detention,

(ii) a complaint has been authorized under Rule 3 (g), or

(iii) a determination of probable cause for detention has been made pursuant to subsection (b).

(b) A determination of probable cause for detention shall be made by an appropriate judicial officer. The appropriate officer shall consider any information presented by the police, whether or not known at the time of arrest. The police shall present the information under oath or affirmation, or under the pains and penalties of perjury. The police may present the information orally, in person or by any other means, or in writing. If presented in writing, the information may be transmitted to the appropriate judicial officer by facsimile transmission or by electronic mail or by such other electronic means as may be found acceptable by the court. The determination of probable cause for detention shall be an ex parte proceeding. The person arrested has no right to appear, either in person or by counsel.

(c) Where subsection (a) requires a determination of probable cause for detention, the police shall present the information necessary to obtain such determination to the appropriate judicial officer as soon as reasonably possible after the arrest, but no later than twenty-four hours after arrest, absent exigent circumstances.

(d) The judicial officer shall promptly reduce to writing his or her determination as to probable cause and notify the police. A copy of the written determination shall be transmitted to the police, by facsimile transmission or other means, as soon as possible.

(e) The judicial officer shall apply the same standard in making the determination of probable cause for detention as in deciding whether an arrest warrant should issue. If the judicial officer determines that there is probable cause to believe the person arrested committed an offense, the judicial officer shall make a written determination of his or her decision which shall be filed with the record of the case together with all the written information submitted by the police.

(f) If there is no probable cause to believe that the person arrested committed an offense, the judicial officer shall order the person's prompt release from custody. The order and a written determination of the judicial officer shall be filed in the District Court having jurisdiction over the location of the arrest, together with all the written information submitted by the police. These documents shall be filed separately from the records of criminal and delinquency cases, but shall be public records.



## Rule 5. THE GRAND JURY

(a) Summoning Grand Juries. As prescribed by law, the appropriate number of jurors shall be summoned in the manner and at the time required, from among whom the court shall select not more than twenty-three grand jurors to serve in said court as long as and at those specific times required by law, or as required by the court.

The regular grand jury shall be called upon and directed to sit by the Chief Justice of the Superior Court Department whenever within his or her discretion the conduct of regular criminal business and timely prosecution within a particular county so dictate.

Notwithstanding the foregoing, special grand juries shall be summoned in the manner prescribed by the General Laws.

(b) Foreperson, Foreperson Pro Tem, Clerk, Clerk Pro Tem. After the grand jurors have been impanelled they shall retire and elect one of their number as foreperson. The foreperson and the prosecuting attorney shall have the power to administer oaths and affirmations to witnesses who appear to testify before the grand jury, and the foreperson shall, under his or her hand, return to the court a list of all witnesses sworn before the grand jury during the sitting. If the foreperson is unable to serve for any part of the period the grand jurors are required to serve, a foreperson pro tem shall be elected in the same manner as provided herein for election of the foreperson. The foreperson pro tem shall serve until the foreperson returns or for the remainder of the term if the foreperson is unable to return. The grand jury may also appoint one of their number as clerk to be charged with keeping a record of their proceedings, and, if the grand jury so directs, to deliver such record to the

attorney general or district attorney. If the clerk is unable to serve for any part of the period the grand jurors are required to serve, a clerk pro tem may be appointed.

(c) Who May be Present. Attorneys for the Commonwealth who are necessary or convenient to the presentation of the evidence, the witness under examination, the attorney for the witness, and such other persons who are necessary or convenient to the presentation of the evidence may be present while the grand jury is in session. The attorney for the witness shall make no objections or arguments or otherwise address the grand jury or the prosecuting attorney. No witness may refuse to appear because of unavailability of counsel for that witness.

(d) Secrecy of Proceedings and Disclosures. The judge may direct that an indictment be kept secret until after arrest. In such an instance, the clerk shall seal the indictment and no person may disclose the finding of the indictment except as is necessary for the issuance and execution of a warrant. A person performing an official function in relation to the grand jury may not disclose matters occurring before the grand jury except in the performance of his or her official duties or when specifically directed to do so by the court. No obligation of secrecy may be imposed upon any person except in accordance with law.

(e) Finding and Return of Indictment. An indictment may be found only upon the concurrence of twelve or more jurors. The indictment shall be returned by the grand jury to a judge in open court.

(f) No Bill; Discharge of Defendant. The grand jury shall during its session make a daily return to the court of all cases as to which it has determined not to present an indictment

against an accused. Each such complaint shall be endorsed "no bill" and shall be filed with the court.

If upon the filing of a no bill the accused is held on process, he or she shall be discharged unless held on other process.

(g) Deliberation. The prosecuting attorney shall not be present during deliberation and voting except at the request of the grand jury.

(h) Discharge. A grand jury shall serve until the first sitting of the next authorized grand jury unless it is discharged sooner by the court or unless its service is extended to complete an investigation then in progress.

## RULE 7. INITIAL APPEARANCE AND ARRAIGNMENT

### (a) Initial Appearance.

(1) Upon Arrest. Upon the arrest of a juvenile, the arresting officer shall notify the parent or guardian of the juvenile and the probation office. A defendant who has been arrested shall be brought before a court if then in session, and if not, at its next session. At that time the defendant shall be interviewed by the probation department; the probation department shall make a report to the court of the pertinent information reasonably necessary to determination of the issues of bail and indigency. If the judge or special magistrate finds that the defendant is indigent or indigent but able to contribute and has not knowingly waived the right to counsel under the procedures established in Supreme Judicial Court Rule 3:10, the Committee for Public Counsel Services shall be assigned to provide representation for the defendant. The judge or special magistrate shall then arraign the defendant or shall set a time for arraignment. The judge or special magistrate shall determine the conditions of the defendant's release, if any.

(2) Upon Summons; Waiver of Initial Appearance. A summonsed defendant who has retained counsel shall be excused from appearing on the return day if such counsel enters an appearance for the defendant prior to the return day, stating thereon that he or she has conferred with the defendant and requests that the case be scheduled for pretrial hearing or other proceeding. Defendant's counsel shall

inform the defendant of the date of the next scheduled event which shall require the defendant's presence.

(b) Appearance of Counsel.

(1) Filing. An appearance shall be entered by the attorney for the defendant and the prosecuting attorney on or before the initial appearance or, if the defendant was summonsed to appear, on or before the scheduled return day. The appearance may be entered either by personally appearing before the clerk or by submitting an appearance slip, which shall include the name, address, and telephone number of the attorney.

(2) Effect; Withdrawal. An appearance shall be in the name of the attorney who files the appearance and shall constitute a representation that the attorney shall represent the defendant for trial or plea or shall prosecute the case, except that if on the return day such a representation cannot be made and no contrary legal restriction applies, (1) the court may permit an appearance to be entered by an attorney to represent the defendant or prosecute the case for such time as the court may order, and (2) the court shall permit an appearance in the name of the prosecuting agency, which shall constitute representations that the agency will prosecute the case, will ensure that throughout the duration of the appearance a prosecutor is assigned to the case, and upon request of the court or a party will identify the prosecutor assigned to the case. If the attorney who files an appearance for the defendant on or before the return day wishes to withdraw the appearance, he or she may do so within fourteen days after the return day, provided that the

attorney who shall represent the defendant at trial files an appearance simultaneously with such withdrawal; thereafter no appearance shall be withdrawn without permission of the court. The appearance of the prosecuting officer shall be withdrawn only with permission of the court.

(3) Notice. A copy of all appearances and withdrawals of appearance shall be filed and shall be served upon the adverse party pursuant to Rule 32.

(c) Arraignment. Arraignment shall consist of the reading of the charges to the defendant and the entry of the defendant's plea to those charges.

(1) Waiver of Reading of Charges. At arraignment the reading of the charges may be waived in open court by the defendant if he or she is represented by counsel.

(2) Entry of Not Guilty Plea. If a defendant is excused from appearing in court on the return day pursuant to this rule, a plea of not guilty shall be entered by the court on the defendant's behalf.

(d) Provision of Criminal Record; Preservation of Evidence. The court shall ensure that at or before arraignment, (1) a copy of the defendant's criminal record, if any, as compiled by the Commissioner of Probation is provided to the defense and to the prosecution, and (2) the parties are afforded an opportunity to move for the preservation of evidence pursuant to Rule 14(a)(1)(E).

(e) Order Scheduling Pretrial Proceedings. At a District Court arraignment on a complaint which is outside of the District Court's final jurisdiction or on which jurisdiction is declined, the court shall schedule the case for a probable cause hearing. In all other District and Superior Court cases the court shall issue an order at arraignment requiring the

prosecuting attorney and defense counsel to (1) engage in a pretrial conference on a date certain, and (2) appear at a pretrial hearing on a specified subsequent date.

## Rule 11. PRETRIAL CONFERENCE AND PRETRIAL HEARING

### (a) The Pretrial Conference.

At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to attend a pretrial conference on a date certain to consider such matters as will promote a fair and expeditious disposition of the case. The defendant shall be available for attendance at the pretrial conference. The court may require the conference to be held at court under the supervision of a judge or clerk-magistrate.

(1) Conference Agenda. Among those issues to be discussed at the pretrial conference are:

(A) Discovery and all other matters which, absent agreement of the parties, must be raised by pretrial motion. All motions which cannot be agreed upon shall be filed pursuant to Rule 13(d).

(B) Whether the case can be disposed of without a trial.

(C) If the case is to be tried, (i) the setting of a proposed trial date which shall be subject to the approval of the court and which when fixed by the court shall not be changed without express permission of the court; (ii) the probable length of trial; (iii) the availability of necessary witnesses; and (iv) whether issues of fact can be resolved by stipulation.

(2) Conference Report.



(A) Filing. A conference report, subscribed by the prosecuting attorney and counsel for the defendant, and when necessary to waive constitutional rights or when the report contains stipulations as to material facts, by the defendant, shall be filed with the clerk of the court pursuant to subdivision (b)(2)(i). The conference report shall contain a statement of those matters upon which the parties have reached agreement, including any stipulations of fact, and a statement of those matters upon which the parties could not agree which are to be the subject of pretrial motions. Agreements reduced to writing in the conference report shall be binding on the parties and shall control the subsequent course of the proceeding.

(B) Failure to File. If a party fails to participate in a pretrial conference or to cooperate in the filing of a conference report, the adverse party shall notify the clerk of such failure. If a conference report is not filed and a party does not appear at the pretrial hearing, no request of that party for a continuance of the trial date as scheduled shall be granted and no pretrial motion of that party shall be permitted to be filed, except by leave of court for cause shown. If the parties fail to file a conference report or do not appear at the pretrial hearing, the case shall be presumed to be ready for trial and shall be scheduled for trial at the earliest possible time. The parties shall be subject to such other sanctions as the judge may impose.

(b) The Pretrial Hearing.

At arraignment, except on a complaint regarding which the court will not exercise final jurisdiction, the court shall order the prosecuting attorney and defense counsel to appear before the court on a date certain for a pretrial hearing. The defendant shall be available for attendance at the hearing. The pretrial hearing may include the following events:

(1) Tender of Plea. The defendant may tender a plea, admission or other requested disposition, with or without the agreement of the prosecutor.

(2) Pretrial Matters. Unless the Court declines jurisdiction over the case or disposes of the case at the pretrial hearing, the pretrial hearing shall include the following events:

(i) Filing of Pretrial Conference Report. The prosecuting attorney and defense counsel shall file the pretrial conference report with the clerk of court.

(ii) Discovery and Pretrial Motions. The court shall hear all discovery motions pending at the time of the pretrial hearing. Other pending pretrial motions may be heard at the pretrial hearing, continued to a specified date for a hearing, or transmitted for hearing and resolution by the trial session.

(iii) Compliance and Trial Assignment. The court shall determine whether the pretrial conference report is complete, all discovery matters have been resolved, and compliance with all discovery orders has been accomplished. If so, the court shall obtain the defendant's decision on waiver of the right to a jury trial, and assign a trial date or trial assignment date. If completion of either the pretrial conference

report or discovery is still pending, the court shall schedule and order the parties to appear for a compliance hearing pursuant to Rule 11(c) unless the aggrieved party waives the right to a compliance hearing.

(iv) The court may issue such additional orders as will promote the fair, speedy and orderly disposition of the case.

(c) Compliance Hearing.

A compliance hearing ordered pursuant to Rule 11(b)(2)(iii) shall be limited to the following court actions:

- (1) determining whether the pretrial conference report and discovery are complete and, if necessary, hearing and deciding discovery motions and ordering appropriate sanctions for non-compliance;
- (2) receiving and acting on a tender of plea or admission; and
- (3) if the pretrial conference report and discovery are complete, obtaining the defendant's decision on waiver of the right to a jury trial, and scheduling the trial date or trial assignment date.

## Rule 12. PLEAS AND WITHDRAWALS OF PLEAS

### (a) Entry of Pleas.

(1) Pleas Which May Be Entered and by Whom. A defendant may plead not guilty, or guilty, or with the consent of the judge, nolo contendere, to any crime with which the defendant has been charged and over which the court has jurisdiction. A plea of guilty or nolo contendere shall be received only from the defendant personally except pursuant to the provisions of Rule 18. Pleas shall be received in open court and the proceedings shall be recorded. If a defendant refuses to plead or if the judge refuses to accept a plea of guilty or nolo contendere, a plea of not guilty shall be entered.

(2) Admission to Sufficient Facts. In a District Court, a defendant may, after a plea of not guilty, admit to sufficient facts to warrant a finding of guilty.

(3) Acceptance of Plea of Guilty, a Plea of Nolo Contendere, or an Admission to Sufficient Facts. A judge may refuse to accept a plea of guilty or a plea of nolo contendere or an admission to sufficient facts. The judge shall not accept such a plea or admission without first determining that it is made voluntarily with an understanding of the nature of the charge and the consequences of the plea or admission.

### (b) Plea Conditioned Upon an Agreement.

(1) Formation of Agreement; Substance. The defendant and defense counsel or the defendant when acting pro se may engage in discussions with the

prosecutor as to any recommendation to be made to a judge or any other action to be taken by the prosecutor upon the tender of a plea of guilty or nolo contendere to a charged offense or to a lesser included offense. The agreement of the prosecutor may include:

(A) Charge Concessions.

(B) Recommendation of a particular sentence or type of punishment with the specific understanding that the recommendation shall not be binding upon the court.

(C) Recommendation of a particular sentence or type of punishment which may also include the specific understanding that the defendant shall reserve the right to request a lesser sentence or different type of punishment.

(D) A general recommendation of incarceration without regard to a specific term or institution.

(E) Recommendation of a particular disposition other than incarceration.

(F) Agreement not to oppose the request of the defendant for a particular sentence or other disposition.

(G) Agreement to make no recommendation or to take no action.

(H) Any other type of agreement involving recommendations or actions.

(2) Notice of Agreement. If defense counsel or the prosecutor has knowledge of any agreement that was made contingent upon the defendant's plea, he or she shall inform the judge thereof prior to the tender of the plea.

(c) Guilty Plea Procedure. After being informed that the defendant intends to plead guilty or nolo contendere:

(1) Inquiry. The judge shall inquire of the defendant or defense counsel as to the existence of and shall be informed of the substance of any agreements that are made which are contingent upon the plea.

(2) Recommendation as to Sentence or Disposition.

(A) Contingent Pleas. If there were sentence recommendations contingent upon the tender of the plea, the judge shall inform the defendant that the court will not impose a sentence that exceeds the terms of the recommendation without first giving the defendant the right to withdraw the plea.

(B) Disposition Requested by Defendant. In a District Court, if the plea is not conditioned on a sentence recommendation by the prosecutor, the defendant may request that the judge dispose of the case on any terms within the court's jurisdiction. The judge shall inform the defendant that the court will not impose a disposition that exceeds the terms of the defendant's request without first giving the defendant the right to withdraw the plea.

(3) Notice of Consequences of Plea. The judge shall inform the defendant on the record, in open court:

(A) that by a plea of guilty or nolo contendere, or an admission to sufficient facts, the defendant waives the right to trial with or without a jury, the right to confrontation of witnesses, the right to be presumed innocent until proved guilty beyond a reasonable doubt, and the privilege against self-incrimination;

(B) where appropriate, of the maximum possible sentence on the charge, and where appropriate, the possibility of community parole supervision for life; of any

different or additional punishment based upon subsequent offense or sexually dangerous persons provisions of the General Laws, if applicable; where applicable, that the defendant may be required to register as a sex offender; and of the mandatory minimum sentence, if any, on the charge;

(C) that if the defendant is not a citizen of the United States, the guilty plea, plea of nolo contendere or admission may have the consequence of deportation, exclusion of admission, or denial of naturalization.

(4) Tender of Plea. The defendant's plea or admission shall then be tendered to the court.

(5) Hearing on Plea; Acceptance. The judge shall conduct a hearing to determine the voluntariness of the plea or admission and the factual basis of the charge.

(A) Factual Basis for Charge. A judge shall not accept a plea of guilty unless the judge is satisfied that there is a factual basis for the charge. The failure of the defendant to acknowledge all of the elements of the factual basis shall not preclude a judge from accepting a guilty plea. Upon a showing of cause the tender of the guilty plea and the acknowledgement of the factual basis of the charge may be made on the record at the bench.

(B) Acceptance. At the conclusion of the hearing the judge shall state the court's acceptance or rejection of the plea or admission.

(C) Sentencing. After acceptance of a plea of guilty or nolo contendere or an admission, the judge may proceed with sentencing.

(6) Refusal to Accept an Agreed Sentence Recommendation. If the judge determines that the court will impose a sentence that will exceed an agreed recommendation for a particular sentence or type of punishment under subdivision (b)(1)(C) of this rule, an agreed recommendation for a particular disposition other than incarceration under subdivision (b)(1)(E), or a request for disposition in a District Court by the defendant under subdivision (c) (2) (B), after having informed the defendant as provided in subdivision (c)(2) that the court would not do so, the judge shall, on the record, advise the defendant personally in open court or on a showing of cause, in camera, that the judge intends to exceed the terms of the plea recommendation or request for disposition and shall afford the defendant the opportunity to then withdraw the plea or admission. The judge may indicate to the parties what sentence the judge would impose.

(d) Deleted.

(e) Availability of Criminal Record and Presentence Report. The criminal record of the defendant shall be made available. Upon the written motion of either party made at the tender of a plea of guilty or nolo contendere, the presentence report as described in subdivision (d)(2) of Rule 28 shall be made available to the prosecutor and counsel for the defendant for inspection. In extraordinary cases, the judge may except from disclosure parts of the report which are not relevant to a proper sentence, diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons. If the report is not made



fully available, the portions thereof which are not disclosed shall not be relied upon in determining sentence. No party may make any copy of the presentence report.

(f) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this subdivision, evidence of a plea of guilty, or a plea of nolo contendere, or an admission, or of an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, later withdrawn, or statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceedings against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, or a plea of nolo contendere, or an admission or an offer to plead guilty or nolo contendere or an admission to the crime charged or any other crime, is admissible in a criminal proceeding for perjury if the statement was made by the defendant under oath, on the record, and in the presence of counsel, if any.

### Rule 13. PRETRIAL MOTIONS

#### (a) In General.

(1) Requirement of Writing and Signature; Waiver. A pretrial motion shall be in writing and signed by the party making the motion or the attorney for that party.

Pretrial motions shall be filed within the time allowed by subdivision (d) of this rule.

(2) Grounds and Affidavit. A pretrial motion shall state the grounds on which it is based and shall include in separately numbered paragraphs all reasons, defenses, or objections then available, which shall be set forth with particularity. If there are multiple charges, a motion filed pursuant to this rule shall specify the particular charge to which it applies. Grounds not stated which reasonably could have been known at the time a motion is filed shall be deemed to have been waived, but a judge for cause shown may grant relief from such waiver. In addition, an affidavit detailing all facts relied upon in support of the motion and signed by a person with personal knowledge of the factual basis of the motion shall be attached.

(3) Service and Notice. A copy of any pretrial motion and supporting affidavits shall be served on all parties or their attorneys pursuant to Rule 32 at the time the originals are filed. Opposing affidavits shall be served not later than one day before the hearing. For cause shown the requirements of this subdivision (3) may be waived by the court.

(4) Memoranda of Law. The judge or special magistrate may require the filing of a memorandum of law, in such form and within such time as he or she may direct, as a condition precedent to a hearing on a motion or interlocutory matter. No motion to suppress evidence, other than evidence seized during a warrantless search, and no motion to dismiss may be filed unless accompanied by a memorandum of law, except when otherwise ordered by the judge or special magistrate.

(5) Renewal. Upon a showing that substantial justice requires, the judge or special magistrate may permit a pretrial motion which has been heard and denied to be renewed.

(b) Bill of Particulars.

(1) Motion. Within the time provided for the filing of pretrial motions by this rule or within such other time as the judge may allow, a defendant may request or the court upon its own motion may order that the prosecution file a statement of such particulars as may be necessary to give both the defendant and the court reasonable notice of the crime charged, including time, place, manner, or means.

(2) Amendment. If at trial there exists a material variance between the evidence and bill of particulars, the judge may order the bill of particulars amended or may grant such other relief as justice requires.

(c) Motion to Dismiss or to Grant Appropriate Relief.

(1) All defenses available to a defendant by plea, other than not guilty, shall only be raised by a motion to dismiss or by a motion to grant appropriate relief.

(2) A defense or objection which is capable of determination without trial of the general issue shall be raised before trial by motion.

(d) Filing. Only pretrial motions the subject matter of which could not be agreed upon at the pretrial conference shall be filed with the court.

(1) Discovery Motions. Any discovery motions shall be filed prior to the conclusion of the pretrial hearing, or thereafter for good cause shown. A discovery motion filed after the conclusion of the pretrial hearing shall be heard and considered only if (A) the discovery sought could not reasonably have been requested or obtained prior to the conclusion of the pretrial hearing, (B) the discovery is sought by the Commonwealth, and the Commonwealth could not reasonably provide all discovery due to the defense prior to the conclusion of the pretrial hearing, or (C) other good cause exists to warrant consideration of the motion.

(2) Non-discovery Pretrial Motions. A pretrial motion which does not seek discovery shall be filed before the assignment of a trial date pursuant to Rule 11(b) or (c) or within 21 days thereafter, unless the court permits later filing for good cause shown.

(e) Hearing on Motions. The parties shall have a right to a hearing on a pretrial motion. The opposing party shall be afforded an adequate opportunity to prepare and submit a memorandum of law prior to the hearing.

(1) Discovery Motions. All pending discovery motions shall be heard and decided prior to the defendant's election of a jury or jury-waived trial. Any discovery matters pending at the time of the pretrial hearing or the compliance hearing shall

be heard at that hearing. Discovery motions filed pursuant to subdivision (d)(1) after the defendant's election shall be heard and decided expeditiously.

(2) Non-Discovery Pretrial Motions. A non-discovery motion filed prior to the pretrial hearing may be heard at the pretrial hearing, at a hearing scheduled to address the motion, or at the trial session. A non-discovery motion filed at or after the pretrial hearing shall be heard at the next scheduled court date unless otherwise ordered.

(3) Within seven days after the filing of a motion, or if the motion is transmitted to the trial session within seven days after the transmittal, the clerk or the judge shall assign a date for hearing the motion, but the judge or special magistrate for cause shown may entertain such motion at any time before trial. If the parties have agreed to a mutually convenient time for the hearing of a pretrial motion, and the moving party so notifies the clerk in writing at the time of the filing of the motion, the clerk shall mark up the motion for hearing at that time subject to the approval of the court. The clerk shall notify the parties of the time set for hearing the motion.

## Rule 14. PRETRIAL DISCOVERY

### (a) Procedures for Discovery.

#### (1) Automatic Discovery.

(A) Mandatory Discovery for the Defendant. The prosecution shall disclose to the defense, and permit the defense to discover, inspect and copy, each of the following items and information at or prior to the pretrial conference, provided it is relevant to the case and is in the possession, custody or control of the prosecutor, persons under the prosecutor's direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case:

- (i) Any written or recorded statements, and the substance of any oral statements, made by the defendant or a co-defendant.
- (ii) The grand jury minutes, and the written or recorded statements of a person who has testified before a grand jury.
- (iii) Any facts of an exculpatory nature.
- (iv) The names, addresses, and dates of birth of the Commonwealth's prospective witnesses other than law enforcement witnesses. The Commonwealth shall also provide this information to the Probation Department.
- (v) The names and business addresses of prospective law enforcement witnesses.
- (vi) Intended expert opinion evidence, other than evidence that pertains to the defendant's criminal responsibility and is subject to subdivision (b)(2). Such

discovery shall include the identity, current curriculum vitae, and list of publications of each intended expert witness, and all reports prepared by the expert that pertain to the case.

(vii) Material and relevant police reports, photographs, tangible objects, all intended exhibits, reports of physical examinations of any person or of scientific tests or experiments, and statements of persons the Commonwealth intends to call as witnesses.

(viii) A summary of identification procedures, and all statements made in the presence of or by an identifying witness that are relevant to the issue of identity or to the fairness or accuracy of the identification procedures.

(ix) Disclosure of all promises, rewards or inducements made to witnesses the Commonwealth intends to present at trial.

(B) Reciprocal Discovery for the Prosecution. Following the Commonwealth's delivery of all discovery required pursuant to subdivision (a)(1)(A) or court order, and on or before a date agreed to between the parties, or in the absence of such agreement a date ordered by the court, the defendant shall disclose to the prosecution and permit the Commonwealth to discover, inspect, and copy any material and relevant evidence discoverable under subdivision (a)(1)(A) (vi), (vii) and (ix) which the defendant intends to use at trial, including the names, addresses, dates of birth, and statements of those persons whom the defendant intends to use as witnesses at trial.

(C) Stay of Automatic Discovery; Sanctions. Subdivisions (a)(1)(A) and (a)(1)(B) shall have the force and effect of a court order, and failure to provide discovery pursuant to them may result in application of any sanctions permitted for non-compliance with a court order under subdivision 14(c). However, if in the judgment of either party good cause exists for declining to make any of the disclosures set forth above, it may move for a protective order pursuant to subdivision (a)(6) and production of the item shall be stayed pending a ruling by the court.

(D) Record of Convictions of the Defendant, Codefendants, and Prosecution Witnesses. At arraignment the court shall order the Probation Department to deliver to the parties the record of prior complaints, indictments and dispositions of all defendants and of all witnesses identified pursuant to subdivisions (a)(1)(A)(iv) and (v) within 5 days of the Commonwealth's notification to the Department of the names and addresses of its witnesses.

(E) Notice and Preservation of Evidence. (i) Upon receipt of information that any item described in subparagraph (a)(1)(A)(i)-(viii) exists, except that it is not within the possession, custody or control of the prosecution, persons under its direction and control, or persons who have participated in investigating or evaluating the case and either regularly report to the prosecutor's office or have done so in the case, the prosecution shall notify the defendant of the existence of the item and all information known to the prosecutor concerning the item's location and the identity of any persons possessing it. (ii) At any time, a party may move for an order to any



individual, agency or other entity in possession, custody or control of items pertaining to the case, requiring that such items be preserved for a specified period of time. The court shall hear and rule upon the motion expeditiously. The court may modify or vacate such an order upon a showing that preservation of particular evidence will create significant hardship, on condition that the probative value of said evidence is preserved by a specified alternative means.

(2) Motions for Discovery. The defendant may move, and following its filing of the Certificate of Compliance the Commonwealth may move, for discovery of other material and relevant evidence not required by subdivision (a)(1) within the time allowed by Rule 13(d)(1).

(3) Certificate of Compliance. When a party has provided all discovery required by this rule or by court order, it shall file with the court a Certificate of Compliance. The certificate shall state that, to the best of its knowledge and after reasonable inquiry, the party has disclosed and made available all items subject to discovery other than reports of experts, and shall identify each item provided. If further discovery is subsequently provided, a supplemental certificate shall be filed with the court identifying the additional items provided.

(4) Continuing Duty. If either the defense or the prosecution subsequently learns of additional material which it would have been under a duty to disclose or produce pursuant to any provisions of this rule at the time of a previous discovery order, it shall promptly notify the other party of its acquisition of such additional material

and shall disclose the material in the same manner as required for initial discovery under this rule.

(5) Work Product. This rule does not authorize discovery by a party of those portions of records, reports, correspondence, memoranda, or internal documents of the adverse party which are only the legal research, opinions, theories, or conclusions of the adverse party or its attorney and legal staff, or of statements of a defendant, signed or unsigned, made to the attorney for the defendant or the attorney's legal staff.

(6) Protective Orders. Upon a sufficient showing, the judge may at any time order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. The judge may alter the time requirements of this rule. The judge may, for cause shown, grant discovery to a defendant on the condition that the material to be discovered be available only to counsel for the defendant. This provision does not alter the allocation of the burden of proof with regard to the matter at issue, including privilege.

(7) Amendment of Discovery Orders. Upon motion of either party made subsequent to an order of the judge pursuant to this rule, the judge may alter or amend the previous order or orders as the interests of justice may require. The judge may, for cause shown, affirm a prior order granting discovery to a defendant upon the additional condition that the material to be discovered is to be available only to counsel for the defendant.

(8) A party may waive the right to discovery of an item, or to discovery of the item within the time provided in this Rule. The parties may agree to reduce or enlarge the items subject to discovery pursuant to subsections (a)(1)(A) and (a)(1)(B). Any such waiver or agreement shall be in writing and signed by the waiving party or the parties to the agreement, shall identify the specific items included, and shall be served upon all the parties.

(b) Special Procedures.

(1) Notice of Alibi.

(A) Notice by Defendant. The judge may, upon written motion of the Commonwealth filed pursuant to subdivision (a)(2) of this rule, stating the time, date, and place at which the alleged offense was committed, order that the defendant serve upon the prosecutor a written notice, signed by the defendant, of his or her intention to offer a defense of alibi. The notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom the defense intends to rely to establish the alibi.

(B) Disclosure of Information and Witness. Within seven days of service of the defendant's notice of alibi, the Commonwealth shall serve upon the defendant a written notice stating the names and addresses of witnesses upon whom the prosecutor intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(C) Continuing Duty to Disclose. If prior to or during trial a party learns of an additional witness whose identity, if known, should have been included in the information furnished under subdivision (b)(1)(A) or (B), that party shall promptly notify the adverse party or its attorney of the existence and identity of the additional witness.

(D) Failure to Comply. Upon the failure of either party to comply with the requirements of this rule, the judge may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule shall not limit the right of the defendant to testify.

(E) Exceptions. For cause shown, the judge may grant an exception to any of the requirements of subdivisions (b)(1)(A) through (D) of this rule.

(F) Inadmissibility of Withdrawn Alibi. Evidence of an intention to rely upon an alibi defense, later withdrawn, or of statements made in connection with that intention, is not admissible in any civil or criminal proceeding against the person who gave notice of that intention.

(2) Defense of Lack of Criminal Responsibility Because of Mental Disease or Defect.

(A) Notice. If a defendant intends to rely upon the defense of lack of criminal responsibility because of mental disease or defect at the time of the alleged crime, the defendant shall, within the time provided for the filing of pretrial motions by

Rule 13(d)(2) or at such later time as the judge may allow, notify the prosecutor in writing of such intention. The notice shall state:

- (i) whether the defendant intends to offer testimony of expert witnesses on the issue of lack of criminal responsibility because of mental disease or defect;
- (ii) the names and addresses of expert witnesses whom the defendant expects to call; and
- (iii) whether those expert witnesses intend to rely in whole or in part on statements of the defendant as to his or her mental condition at the time of the alleged crime or criminal responsibility for the alleged crime.

The defendant shall file a copy of the notice with the clerk. The judge may for cause shown allow late filing of the notice, grant additional time to the parties to prepare for trial, or make such other order as may be appropriate.

(B) Examination. If the notice of the defendant or subsequent inquiry by the judge or developments in the case indicate that statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime will be relied upon by expert witnesses of the defendant, the court, upon its own motion or upon motion of the prosecutor, may order the defendant to submit to a psychiatric examination consistent with the provisions of the General Laws and subject to the following terms and conditions:

- (i) The examination shall include such physical and psychological examinations and physiological and psychiatric tests as the examiner deems necessary to form an opinion as to the mental condition of the defendant at the time the alleged offense

was committed. No examination based on statements of the defendant may be conducted unless the judge has found that (a) the defendant then intends to offer at trial psychiatric evidence based on his or her own statements or (b) there is a reasonable likelihood that the defendant will offer that evidence.

(ii) No statement, confession, or admission, or other evidence of or obtained from the defendant during the course of the examination, except evidence derived solely from physical or physiological observations or tests, may be revealed to the prosecution or anyone acting on its behalf unless so ordered by the judge.

(iii) The examiner shall file with the court a written psychiatric report which shall contain his or her findings, including specific statements of the basis thereof, as to the mental condition of the defendant at the time the alleged offense was committed.

The report shall be sealed and shall not be made available to the parties unless (a) the judge determines that the report contains no matter, information, or evidence which is based upon statements of the defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime, or which is otherwise within the scope of the privilege against self-incrimination; or (b) the defendant files a motion requesting that the report be made available to the parties; or (c) during trial the defendant raises the defense of lack of criminal responsibility and the judge is satisfied that (1) the defendant intends to testify or (2) the defendant intends to offer expert testimony based in whole or in part upon statements of the

defendant as to his or her mental condition at the time of, or criminal responsibility for, the alleged crime.

If a psychiatric report contains both privileged and nonprivileged matter, the court may, if feasible, at such time as it deems appropriate, make available to the parties the nonprivileged portions.

(iv) If a defendant refuses to submit to an examination ordered pursuant to and subject to the terms and conditions of this rule, the court may prescribe such remedies as it deems warranted by the circumstances, which may include exclusion of the testimony of any expert witness offered by the defense on the issue of the defendant's mental condition or the admission of evidence of the refusal of the defendant to submit to examination.

(3) Notice of Other Defenses. If a defendant intends to rely upon a defense based upon a license, claim of authority or ownership, or exemption, the defendant shall, within the time provided for the filing of pretrial motions by Rule 13(d)(2) or at such later time as the judge may direct, notify the prosecutor in writing of such intention and file a copy of such notice with the clerk. If there is a failure to comply with the requirements of this subdivision, a license, claim of authority or ownership, or exemption may not be relied upon as a defense. The judge may for cause shown allow a late filing of the notice or grant additional time to the parties to prepare for trial or make such other order as may be appropriate.

(c) Sanctions for Noncompliance.

(1) Relief for Nondisclosure. For failure to comply with any discovery order issued or imposed pursuant to this rule, the court may make a further order for discovery, grant a continuance, or enter such other order as it deems just under the circumstances.

(2) Exclusion of Evidence. The court may in its discretion exclude evidence for noncompliance with a discovery order issued or imposed pursuant to this rule.

Testimony of the defendant and evidence concerning the defense of lack of criminal responsibility which is otherwise admissible cannot be excluded except as provided by subdivision (b)(2) of this rule.

(d) Definition. The term "statement", as used in this rule, means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) a written, stenographic, mechanical, electrical, or other recording, or transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.